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BY HAND DELIVERY

Honorable Liane Randolph, Chairman
and Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Commission's 2005-2006 Strategic Plan - Agenda Item #14

Dear Chairman Randolph and Commissioners:

Please accept this comment on the Executive Director's Memorandum concerning the subject of revision of the Commission's Strategic Plan. These comments are my own, and do not necessarily reflect the views of my clients or my law firm.

The Executive Director's Memorandum was a thoughtful, comprehensive preliminary assay of the scope of the Commission's goals and objectives and suggestions for possible legislative, regulatory and administrative changes to improve the Commission's administration, interpretation and enforcement of the Political Reform Act ("the Act") . The task of updating and revising the Strategic Plan is commendable and is a useful planning exercise. Many of the suggestions are good ones, and probably will be unobjectionable.

I respectfully submit a few suggestions for this list.

1 McPherson Commission Report: In 2001, the McPherson Commission prepared a comprehensive report on the Commission and the Act. That Report made a number of recommendations for legislative, regulatory and administrative changes to simplify the Act and make it more comprehensible and enforceable. The FPPC held one hearing on the Report, and did not undertake at that time a comprehensive review of recommendations proposed in the Report. All the Commissioners should read that Report and take another look at its recommendations. A few of the McPherson Commission recommendations were implemented through legislation and regulations, but many others were not.

Undoubtedly, some of the recommendations may be outdated, or new issues have arisen that may suggest different changes. For example, Proposition 34 was adopted after the Report was issued and of course has presented its own set of issues for regulatory action.

2. Enforcement Policy: Practitioners have regularly called for the Commission to review its enforcement policy. This is a good time to renew that call, because new systemic enforcement problems have arisen. Also, new Commissioners have taken the places of former Commissioners and may have different perspectives on issues such as (a) how the Commission prosecutes enforcement cases, (b) which cases are most important to prosecute, (c) what is the balance between Commission and staff responsibilities, and (d) how all of this serves the public interest (not only in enforcement itself but how enforcement affects participation in the politics and government at the state and local levels.)

A few issues are worth reviewing but this by no means exhausts the useful possibilities:

A. Streamlined Enforcement Policy: Does the success of the streamlined enforcement policy in some compliance areas commend its use in other areas? Fine levels have been raised substantially from the initial levels. Has this raising of the fines promoted settlements or improved compliance?

B. Major Donor and Late Contribution Enforcement: California remains the only state that requires non-"recipient committee" donors to file campaign reports. Innocent or inadvertent non-compliance with this requirement has been the largest – resulting in a substantial amount of the fines and penalties imposed by the Commission – among all types of enforcement cases over the past seven years. Of course, recipient committees disclose all such donors on their campaign reports.

With electronic filing by recipient committees, the "evidence" of major donor non-filing of regular and late contribution reports largely comes from these recipients' public disclosures. That is to say, protecting the public record which has been the justification for dual filing has itself become the source of fining donor non-disclosure that was mandated to

improve public disclosure in the first place.

At one time, the primary justification of the need for redundant recipient and donor filings was to enable enforcement authorities to police potential non-filing. Because electronic campaign report filing systems enable any interested person to identify donors from the records data base of recipient committee filings, the primary justification not to scrap the dual filing system has become the supposed imperfection of the Secretary of State's electronic disclosure system itself. However, the "imperfect system" rationale now rings hollow. In this regard, the proposed changes to the Major Donor Committee filing thresholds (as suggested in the McPherson Report and the Executive Director's Memorandum) would be a helpful "band-aid" but not a solution – which is the elimination of the redundant system where donor information now is readily available on line for anyone with the mildest curiosity and basic computer savvy.

C. Private Attorney General Enforcement Cases: In 1998, the Commission faced an onslaught of private attorney general enforcement actions brought by Tony Miller, Esq. This situation prompted some changes in enforcement practices including most notably the streamlined enforcement program.

This year, another private attorney civil litigant, Norm Ryan, precipitated another onslaught by filing an omnibus civil complaint against hundreds of donors arising from 2002 contribution activity. The problem this year may result in part from some inconsistencies in the statutory scheme.

Under Government Code section 91007, a complainant may commence a private attorney general civil enforcement action only after making a request for prosecution by the Commission, followed by Commission determination not to proceed within 120 days after request has been made by the complainant. The Act also provides that no civil action may be "filed" after the Commission has entered an administrative enforcement order against a person. (Gov. Code section 91008.5.) Further not more than one civil judgment on the merits may be obtained for campaign disclosure violations. (Gov. Code section 91008.) Thus – and here is where the inconsistency in the statutory scheme arises – the Commission

may be reluctant in situations in which a complainant has requested Section 91007 prosecution and the Commission has failed to act within 120 days, to initiate a civil settlement that would "cut off" a private attorney general action that has already been filed. This is so even where it is agreed that the private attorney general litigation practice may verge on abuse.

At this time, it may be useful for the Commission as part of its Strategic Plan revision to consider seeking legislative change, or simply adopting a policy or regulation, that would specifically permit the Commission to bring actions under Section 91008 – even after it may have allowed a private litigant technical authority to proceed with civil litigation after the filing of a Section 91007 complaint – in order to police the system in the public interest to prevent chaos such as the Ryan litigation has engendered.

These are just a few suggestions that would complement the comprehensive review the Executive Director's Memorandum recommends. I look forward to working with your staff and the Commissioners as you implement the review and consider proposals to include in a new Strategic Plan.

Very truly yours,

FOR

Charles H. Bell, Jr.

CHB/jg